COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2017-P-0748

WARREN YEE
Plaintiff - Appellant

v.

MASSACHUSETTS STATE POLICE
Defendant - Appellee

ON APPEAL FROM A DECISION
OF THE SUPERIOR COURT

BRIEF OF THE PLAINTIFF - APPELLANT

Jonathan J. Margolis (BBO #319980)
jmargolis@theemploymentlawyers.com
Beth R. Myers (BBO #676043)
beth@theemploymentlawyers.com
Powers, Jodoin, Margolis &
Mantell LLP
111 Devonshire Street
Boston, MA 02109
(617) 742-7010

Gar Chiang
BBO #683460
garchiang@gmail.com
65 Harrison Avenue
Suite 208
Boston, MA 02111
617-901-9595

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Secondary Sources

ISSUES PRESENTED FOR REVIEW

1. Can refusal to grant a transfer that would provide greater employment opportunities be an adverse employment action that would justify recovery under c. 151B?

2. May summary judgment be granted where the moving party depends upon testimony or evidence from its own witnesses, when the opposing party has presented evidence to support its position?

The plaintiff/appellant (hereafter, "the plaintiff") suggests that the answer to the first question is "Yes," and that the answer to the second is "No."

STATEMENT OF THE CASE

The complaint in this matter was filed on April 3, 2014. (R. 3.) A motion to dismiss the complaint was filed on June 16, 2014. (R. 21.) It was denied on March 16, 2015. (R. 30.) Following discovery, the defendant filed a motion for summary judgment on July 18, 2016. (R. 38.) After argument, that motion was allowed on March 8, 2017. (R. 304.) The plaintiff timely filed his notice of appeal. (R. 314.)

FACTS

Warren Yee is a naturalized American citizen,

born in Hong Kong in 1954. (R. 154.) He came to the United States in 1963. (R. 154-55.) After service in the United States Army (R. 158), he earned a bachelor's degree from the University of Massachusetts at Boston and a master's degree in criminal justice from Anna Maria College. (R. 286.)

Lt. Yee speaks Chinese as well as English. (R. 300.)

Lt. Yee joined the Metropolitan District Commission Police Force in 1980, and was promoted to sergeant in 1987. (R. 159-60, 286.) In 1992, the Metropolitan District Commission Police were merged with the State Police, and the plaintiff was transferred to that organization. (R. 287.) The State Police is an agency of the Commonwealth. (R. 279.)

In 1998, the plaintiff was promoted to the rank of lieutenant. (R. 161.)

As a lieutenant, the plaintiff gained wide supervisory experience. He was a shift commander for eleven years (R. 162, 164-5, 168, 170); he was assigned to the Staff Inspection Unit (R. 163-64); he was a communications officer in charge of all State Police dispatchers (R. 166); and he served as a

barracks commander (R. 168).

As of February 2015, the most recent date for which the State Police provided information, Lt. Yee was the only Asian-American to hold the rank of lieutenant or above. (R. 145-46.) That has been true at least since January 2008, apart from a brief period in 2009 and perhaps part of 2010 (information supplied by the defendant is not clear on this point), when there was one other. *Id.*

As of February 2015, the State Police had 2,225 members. Of these, 1,981 (89 percent) were white, 128 (5.75 percent) were African-American, 63 (2.8 percent) were Hispanic, and 44 (2 percent) were Asian. (R. 145-46.) As of the same date, there were 265 officers of the grades of lieutenant and above. Of those, 250 (94.3 percent) were white, 11 (4.2 percent) were African-American, 3 (1.1 percent) were Hispanic, and one (Lt. Yee) was Asian. *Id.*

In response to interrogatories from the plaintiff, the State Police supplied data about the racial composition of the force for various dates from 2008 to 2015. (R. 145-46.) The statistics did not change notably over that time, and did not demonstrate that the defendant's ranks were becoming much more

diverse. Thus, in January 2008, the force as a whole was 89.8 percent white; in February 2015, the figure was 89.03 percent. (R, 265-66.) In the intervening years, the corresponding figures ranged from 90.3 percent white in March 2011 to 88.74 percent in August 2014. *Id.*

With respect to senior officers, those of lieutenant and above, the percentage of whites ranged from 97.28 percent in January 2012 to 94.32 percent in February of 2015; in every period for which the defendant supplied data, the percentage of white superior officers was more than 5 points higher than for whites in the composition of the entire force. *Id.*

In December 2008, Lt. Yee submitted a request for transfer to Troop F, which is based at Logan Airport and patrols facilities operated by the Massachusetts Port Authority, including Logan Airport, Worcester Regional Airport, Hanscom Field and the Seaport district. (R. 288-89.) Lt. Yee requested the transfer because he knew that members of Troop F had greater opportunities for overtime and police details than other members of the State Police. (R. 173.) That was confirmed by a lieutenant who was assigned to

Troop F. (R. 225-26.) Lt. Yee, then, considered Troop F to be a desirable assignment, because it offered the opportunity to earn considerably more compensation than other posts. (R. 299.)

Typically, there are eight lieutenants assigned to Troop F. (R. 106.)

At all relevant times, transfers in the State Police were governed by a procedure outlined in a General Order designated as ADM-27. (R. 177, 237.) Members of collective bargaining units may bid for assignments. (*Id.*) Lieutenants do not have right to bid. ADM-27 defines non-biddable assignments as follows:

> All assignments not otherwise established as a biddable assignment pursuant to the Collective Bargaining Agreement.
>
> Department non-biddable assignments include, but are not limited to:
>
> - Division of Investigative Services;
> - Division of Administrative Services;
> - Division of Standards and Training;
> - Division of Field Services pursuant to the Collective Bargaining Agreement, and
> - Office of the Superintendent.

(R. 177.) (Emphasis supplied.)

ADM-27 outlined a highly articulated process for filling vacancies in non-biddable assignments. It specifies, in part, that

> Members who request a transfer to a non-biddable assignment within the Department shall submit the following to Human Resources Section:
>
> • A To/From;[1]
> • A resume; and
> • Any other materials required within the posting.
>
> The member shall forward a copy of the above items to:
>
> • The current Commanding Officer; and
> • The Commanding Officer of the requested section/unit.

(R. 178.)

For assignments within troops the process included a 10-day posting period for vacancies, and a requirement that, "The Troop Commander, with the Commanding Officer of the section/unit where applicable, shall review submissions, schedule interviews, conduct the selection process, and select the final candidate(s)." (R. 180.)

Despite the written order, the actual selection process, at least within Troop F, was considerably less formal. As described by Maj. William Christiansen, troop commander from January 2012 at least through January 2016, it went as follows:

When there's an opening, we review the list.

---

[1] The phrase "To/From" refers to a memorandum to one officer, from another.

> We look for candidates both on the list and off the list. When I say "we," it's generally been Captain McGinn [the troop executive officer] and myself doing that. We look at it. We look at the experience, you know, whether or not we know them, the familiarity with that particular individual. We look at the different individual qualities of the particular person. We will contact them, have a conversation generally. Then we need to get approval obviously from the Colonel's office, the Lieutenant Colonel, and then we offer them the job.

(R. 187, 196-97.)

Although Lt. Yee was known to the commander and executive officer of Troop F to be seeking a transfer to that unit, he was never interviewed for a post at the troop. (R. 197-99, 203-04.)

Between the date on which Lt. Yee signaled his interest in the transfer and September 2012 (the significance of which is discussed below), at least nine persons were either transferred as lieutenants to Troop F, or promoted from sergeant to lieutenant within the troop and retained there. (R. 256-57; 260.) All of them were white males, and seven were younger than Lt. Yee; six were nine or more years younger than the plaintiff. (R. 256-57.)

On September 20, 2012, Lt. Yee sent a To/From to Col. Timothy P. Alben, Superintendent of the State Police. (R. 260-61.) In the memorandum, Lt. Yee

noted his 2008 request for a transfer to Troop F, and recounted the number of individuals who had been transferred to the troop as lieutenants, or had been promoted to lieutenant and retained within the troop, that most of them were younger than he, and that all were white males. Lt. Yee went on,

> The department has always stated that it promotes affirmative action, diversity, and equality which I assumed also included equal opportunity for transfer. Yet I feel that under the disguise that there are no bidding rights for the rank, of Lieutenant, I have been discriminated against either because of my ethnic background or my age.

(R. 260.) He concluded by noting,

> I am in the twilight of my career, I hope the department can see the discrimination that is occurring here from my perspective and rectify it by giving me an opportunity to work at SP Logan.

(R. 261.)

Lt. Yee's To/From was received in the superintendent's office on September 21, 2012. (R. 260.) Colonel Alben replied on September 26, 2012, noting that transfer requests were no more than that, requests, and maintaining that the department did promote diversity. (R. 263.)

On September 23, 2012, two days after Lt. Yee's To/From was received by Col. Alben, Shawn Lydon was

promoted from sergeant to lieutenant and as of that date transferred to Troop F.[2] (R. 215.) Lt. Lydon, who is white and approximately 10 years younger than the plaintiff, had been subordinate to Lt. Yee at Troop H immediately before his promotion and transfer (R. 213, 215, 257). He described the process by which he was transferred as follows:

> I got promoted, and then I received a phone call from Captain McGinn from the airport.[3]
> ...
> Q. When Captain McGinn called you, what did he say to you? In that conversation, what did he say to you and what did you say to him?
> A. He said, "You are going to be promoted to lieutenant. Congratulations. We have an opening at F Troop. Your name has come up. You are a competent guy. We know you work on the CAT Team. We would like to know if you'd be interested in coming over to the airport as a lieutenant."

(R. 215, 218.)

At the time of his transfer, Lt. Lydon had not worked with either Maj. Christenson, the troop commander, nor with the executive officer, Capt. McGinn, although he and McGinn had played hockey

---

[2] The promotion had been known about for some unstated period before then. (R. 238.)
[3] Lt. Lydon clarified that, "It [the promotion] was going to be effective Sunday," which would have been September 23d, but he was contacted before then. (R. 215-16.)

together at some earlier time. (R. 216, 219-20, 238.) Lt. Lydon had not requested a transfer to Troop F. (R. 216-17.)

During his tenure at Troop F, according to Lt. Lydon's estimate, he earned from overtime and police details "over $30,000" more annually than he had in his prior assignment at Troop H, with Lt. Yee. (R. 225-26.) When he was (involuntarily) transferred out of Troop F, his income dropped by a like amount. (R. 224, 226, 300.)

According to Capt. McGinn, the principal reason for picking Lt. Lydon for transfer to Troop F was that he had worked on a Community Action Team (CAT team) in his career. (R. 238.) Lydon described the duties of a CAT team this way:

> The Community Action Team writes tickets. They go to a specific area within the troop, a problem area where there may be speeders, high crime, and they would saturate that area two or three nights a week with three or four troopers.
>
> You go and you write tickets, sort of a zero tolerance. You also would be available to the duty office, to go to rollovers, any kind of demonstration or emergency situation. Basically it was a proactive team that wrote tickets and made arrests.

(R. 213-14.) At Troop F, however, Lt. Lydon was not assigned to a CAT team. Instead, he was the midnight

shift commander — the same duty that Lt. Yee had more than 10 years of experience with. (R. 161, 165-65; 168; 221.) Lt. Yee also had much broader experience than Lt. Lydon, having been at various times assigned to the Staff Inspections unit; been a communications officer (in which he supervised all State Police dispatchers); and been a barracks commander. (R. 287-88.)

Maj. Christenson described how Lt. Lydon was selected as follows:

> It was on a recommendation from Captain Francis McGinn, my executive officer.
> ...
> Like Lieutenant DeAmbrose, he was on the CAT, Community Action Team, and Captain McGinn said he had known some good qualities about him, and he thought he would be a good addition to Troop F.

(R. 200.) Christenson did not know Lydon personally, had never worked with him, and did not interview him before he was picked for Troop F. (R. 215, 218, 219.) Nor did Capt. McGinn, the person on whom Christenson said he relied, have any actual experience with or personal knowledge of Lydon's work. (R. 238.)

On the other hand, although he knew of Lt. Yee's interest in coming to Troop F, Christenson did not ask anyone about the plaintiff's suitability for the

opening to which Lydon was assigned ultimately; he did not review Lt. Yee's performance report, nor did he inquire of the plaintiff's troop commander or any of the defendant's command staff about the plaintiff's suitability for the position. Indeed, he admitted that he knew nothing about the quality of Lt. Yee's work. (R. 204, 205.)

From the date of Lt. Lydon's transfer until January 2016 (when depositions in this matter were taken), three more sergeants were promoted to lieutenant from within Troop F and remained there. (R. 201-02.) All were white; one of the three was female. (R. 201.) They appear to have been the only new lieutenants at the troop during that time. (*Id.*)

ARGUMENT

I. THE COURT BELOW ERRED IN RULING THAT REFUSAL TO PROVIDE AN ADVANTAGEOUS TRANSFER DID NOT VIOLATE CHAPTER 151B.

A. Denial Of A Transfer That Would Result In The Opportunity To Earn Greater Compensation Is An Adverse Employment Action.

The court below clearly erred when it ruled that Lt. Yee had not suffered an adverse employment action in being denied an advantageous transfer to Troop F, because there is evidence that the plaintiff suffered tangible and material economic loss from being

deprived of the opportunities offered to members of Troop F, in particular in the form of chances to work more overtime and police details than troopers otherwise similarly situated.

Chapter 151B identifies various actionable adverse actions as including discrimination with respect to "compensation or in terms, conditions or privileges of employment." G.L. c. 151B, §§ 4(1), 4(1C) (provisions applicable to national origin or age discrimination).

Lt. Yee alleges loss of chances for overtime and detail work. Such losses would reflect a deprivation of "compensation" directly implicating the statutory description of an adverse action. Id. Consequently, a job action that leads to the loss of overtime "opportunities" constitutes an adverse action. *Core-Boykin v. Boston Edison Co.*, 17 Mass. L. Rptr. No. 25, 2004 Mass. Super. Lexis 128, at 16 ("A worker's salary, including the opportunity for overtime pay, is clearly a condition of employment that cannot be impaired on account of gender or race"); *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 40 (1st Cir. 2007) (retaliation for exercise of First Amendment rights).

Such a loss constitutes an adverse job action, even if the employer's decision that causes the loss is discretionary in nature. *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply to not provide the benefit at all").

The lost compensation alleged in this case is material and substantial. Within three days of Lt. Yee's September 20, 2012, notification of discrimination to Col. Alben, the defendant instead transferred Lt. Lydon, a younger, white, junior individual to Troop F, from Troop H – the same transfer sought by Lt. Yee. (R. 215, 257, 260-61) Following his transfer to Troop F, now-Lieutenant Lydon earned over $30,000 per year in additional compensation than he had before, based on overtime and police details. (R. 225-26, 300.) When Lt. Lydon was (involuntarily) transferred out of Troop F back to Troop H, his income dropped by a similar amount. (R. 224, 226, 300.)

Thus, the evidence demonstrates an adverse action, because a reasonable jury could find that the

refusal to transfer Lt. Yee resulted in a loss of compensation that he would have expected to earn.

B. The Court Below Erred In Failing To Acknowledge That Denial Of Opportunity May Be An Adverse Action And Violate c. 151B.

The trial court acknowledged that if the transfer at issue would necessarily have resulted in higher compensation, then the failure to transfer would constitute an adverse action. (R. 310). The trial court erred, however, in ignoring the fact a denial of opportunity for benefits to the employee, whether as a result of a transfer or refusal to transfer, constitutes an adverse action. *Core-Boykin v. Boston Edison Co.*, *supra* (c. 151B); *Welch v. Ciampa*, 542 F.3d 927, 936 (1st Cir. 2008) (1st Amendment). The First Circuit has also recognized that there is an adverse action in a closely analogous situation, when there was a loss of the opportunity to work paid security details. *Bergeron v. Cabral*, 560 F.3d 1, 9 (1st Cir. 2009), *abrogated on other grounds by Maldonado v. Fonanes*, 568 F.3d 269(1st Cir. 2009).

The court below's reasoning fails to acknowledge that violation of c. 151B and other anti-discrimination laws often inheres precisely in the denial of opportunity – that is, the chance to obtain

equal benefits with other employees – whether to obtain greater compensation, higher status, more authority or better working conditions. There is, after all, a reason why the federal anti-discrimination agency is known as the Equal Employment Opportunity Commission (Emphasis supplied): Because affording equality of opportunity is central to the anti-discrimination laws.

A reasonable jury could conclude that Lt. Yee would have availed himself of the opportunity for additional overtime and details. His unchallenged testimony was that he applied for the transfer for the purpose of benefitting from those opportunities. (R. 173.) That testimony must be accepted as true at this stage. *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000). Denying the plaintiff the option to accept additional overtime or detail work was harmful to him, in that it limited his potential income. That provides sufficient grounds for this action.

The trial court also erred in holding that Lt. Yee's testimony was insufficient to avoid summary judgment as it did not establish that, had he been transferred, he "would have worked the same paid

details and just as much overtime as Lieutenant Lydon did." (R. 311.) That has never been the standard. There is no burden to prove that Lt. Yee would have opted for exactly the same compensation as someone else. He only need show that he would have had the opportunity, and that he had an intention to avail himself of that opportunity. We have that evidence here, based on the fact that the additional opportunities were the first reason he gave for seeking the transfer. (R. 173.) *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 691 (7th Cir. 2010) (if based upon personal knowledge or firsthand experience, self-serving testimony establishes issue of fact).

Lt. Yee established his loss by showing that a comparator, Lt. Lydon, was able to increase his compensation by $30,000 per year. (R. 225-26.) Lt. Lydon was transferred at a time when the deciding superior officers knew that Lt. Yee had requested transfer, and the transfer from Troop H – where both Lt. Yee and Lt. Lydon had been serving – to Troop F was precisely the action that Lt. Yee sought. The Superior Court wrongfully dismissed this evidence as "anecdotal" (R. 311), faulting the plaintiff for providing evidence of the income of only one of the

lieutenants transferred to Troop F after Lt. Yee sought to be moved there. (R. 310.) In doing so, the court ignored the well-established principle that a single disputed fact compels denial of a motion for summary judgment. Mass. R. Civ. P. 56(c); *Premier Capital LLC v. KMZ, Inc.*, 464 Mass 467,474 (2013) and, under Fed. R. Civ. P. 56, *Celotex v. Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It is not the function of the court to find facts, or to assess the strength of the evidence, but only to determine whether disputes of material fact exist. *Kelley v. Rossi*, 395 Mass. 659, 663 (1985); *Attorney General v. Bailey*, 386 Mass. 367, 370-71 (1982). The plaintiff's proof of a lost opportunity to earn tens of thousands of dollars in additional compensation through being denied the transfer he sought is a material fact in dispute, and renders entry of summary judgment erroneous.

The record shows that Troop F offered the chance to obtain greater opportunities for paid details and overtime than other assignments. (R. 225-26.) The failure to afford Lt. Yee an equal chance to take advantage of those opportunities violated G.L. c. 151B. *See LaBonte v. Hutchins & Wheeler*, 424 Mass. 813, 819, n. 9 (1997) (denial of opportunity to work

with reasonable accommodation); *Ocean Spray Cranberries, Inc. v. M.C.A.D.* 441 Mass. 632, 649 (2004) (purpose of law against handicap discrimination is to assure each person equal terms and benefits of employment).

The trial court also erred when implying more broadly that a failure to transfer could not be an adverse action. Numerous courts have found that a refusal to provide a lateral transfer may be discriminatory, in violation of law. The First Circuit did so as far back as 1997, in *Randlett v. Shalala*, 118 F.3d 857, 862. The Seventh Circuit held similarly in a case in which a police officer was denied a temporary assignment that would have resulted in additional pay and had the potential to advance her career. *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007).[4] The *Lewis* court declared that

> [A]lthough the adverse employment action requirement is a limiting principle within the statute, we cannot allow the need for a limiting principle to inadvertently create a loophole for discriminatory actions by employers. Adverse employment actions should not be defined so narrowly as to give an employer a "license to discriminate." *Farrell [*v. Butler University], 421 F.3d

[4] The Superior Court cited *Lewis*, but only to distinguish it on the assertion that the failure to make a transfer did not cost Lt. Yee money.

[609] at 614.

Id. *See*, also, *Alvarado v. Texas Rangers*, 492 F.3d 605, 614 (5th Cir. 2007), in which summary judgment was denied on the basis that the plaintiff had presented evidence that a transfer from another law enforcement agency to the Texas Rangers would have been prestigious; in *Alvarado*, the plaintiff would have had no additional pay had the transfer been granted.[5] Here, Lt. Yee showed that the refusal to transfer him cost him the opportunity to earn substantial additional pay. (R. 173, 225-26.)

Two federal district court judges in Massachusetts also have found that a failure or refusal to provide a transfer may violate anti-discrimination laws. *El Sayed v. Garda New England, Inc.*, 2016 U.S. Dist. LEXIS 90970, *10; and *Hurley-Bardige v. Brown*, 900 F. Supp. 567, 570-71 (1995) (interpreting the Rehabilitation Act, 29 U.S.C. §729).

---

[5] In *Alvarado*, the Fifth Circuit refers repeatedly to an assignment with the Texas Rangers as a promotion, but it is clear from the context that the court means that being a sergeant in the Texas Rangers was more prestigious than holding the same rank in the Special Crimes Service of the Texas Criminal Law Enforcement Division. There was no suggestion in *Alvarado* that the plaintiff would have a different rank or earn more pay if she had obtained the sought-after transfer.

Significantly, in a case involving the State Police, the Massachusetts Commission Against Discrimination held that the refusal to transfer a trooper after request constituted retaliation in violation of c. 151B. *Magill v. Massachusetts State Police*, 22 M.D.L.R. 355 (2002).

The error of the court below is also illustrated by considering the converse of Lt. Yee's experience. Had he been assigned to Troop F and then, against his will, been transferred to an assignment that paid him $30,000 less per year, he would have had a recognized claim. *Morrison v. N. Essex Cmty. Coll.*, 56 Mass. App. Ct. 784, 794 (2002), and *see AMTRAK v. Morgan*, 536 U.S. 101, 114 (2002) (transfer may be an actionable employment "unlawful employment practice"). No principled distinction can be made between an undesirable transfer and refusal to make one that would be advantageous.

An allegation that an advantageous transfer was denied, then, identifies an adverse employment action that satisfies the requirements to bring a claim under G.L. c. 151B. The Superior Court committed error in determining that Lt. Yee may not bring his claim for the State Police's failure to afford him an

advantageous transfer, and its decision should be reversed.

II. THE DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE EVIDENCE IN THE RECORD THAT THE COURT IS ENTITLED TO CONSIDER.

The Superior Court rested its decision on its (erroneous) conclusion that Lt. Yee could not show that he had suffered an adverse employment action. Even without that error, however, summary judgment would have to be denied, because the evidence relied on by the defendant may not form the basis for summary judgment, and Lt. Yee has advanced grounds that entitle him to trial.

A. The Defendant Cannot Prevail, Because Its Motion Depends Upon Evidence From Interested Witnesses That Is Not Cognizable At Summary Judgment.

The proper analysis of a motion for summary judgment is the same as that for judgment notwithstanding the verdict. *Bulwer v. Mt. Auburn Hosp.* 473 Mass. 672, 682, n. 8 (2016): The court should determine whether anywhere in the record, from whatever source derived, there is evidence from which a reasonable juror could conclude that the plaintiff could prevail. *Poirier v. Plymouth*, 374 Mass. 206, 212 (1978). As with a motion under Rule 50, in

assessing the evidence presented in support of a motion for summary judgment the court must disregard all testimony favorable to the moving party that jurors would not be compelled to credit. Thus, all testimony by defendants' interested witnesses must be put aside, because jurors could reject it. *Tosti v. Ayik*, 394 Mass. 482, 494 (1985).

The plaintiff having advanced sufficient admissible evidence in support of his claims, summary judgment may not be granted based upon evidence from the defendant's witnesses, whom the fact-finder is not required to believe. *Reeves v. Sanderson Plumbing Prods.* 530 U.S. 133, 152 (2000): "the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses,'" quoting from 9A C. Wright & A. Miller, Federal Practice and Procedure §2529 (2d Ed., 1995), p. 300. And *see, Bulwer, supra*, 473 Mass. at 682 n. 8, quoting from *Phelan v. May Dept. Stores*, 443 Mass. 52, 55 (2004): "We ask whether, construing the evidence most favorably to the plaintiff, and 'without weighing the credibility of the witnesses or otherwise

considering the weight of the evidence, the jury reasonably could have returned a verdict for the plaintiff.'"

Disregard of the defendants' interested witnesses is required insofar as they would support the motion, because at summary judgment – as in a motion for JNOV – the moving party bears the burden of persuasion to show that there is no material issue on which the plaintiff could conceivably prevail. *Bulwer, supra,* 473 Mass. at 683. The court, then, may not credit evidence that jurors would be entitled to disbelieve. That excludes testimony and other evidence from the defendant's interested witnesses.

Here, the defendant's motion is necessarily grounded on the credibility of its witnesses, particularly Maj. Christenson and Capt. McGee. *See,* e.g., Defendant's Statement of Material Facts About Which There Is No Genuine Issue to Be Tried, pars. 5, 7, 9, 10, 11 and 12. (R. 281-83.) Without the majors' and captains' testimony as to their motives (which is self-serving as well as being in aid of their employer), and about the process they followed in selecting individuals for transfer, the defendant has no basis at all for its motion.

To prevail at summary judgment, the defendant's witnesses would have to be believed. But the credibility of those witnesses cannot be assessed short of a trial, and a motion for summary judgment that relies on believing such evidence must be denied. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Reeves, supra*, 530 U.S. at 151-52, quoting from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As the allegations made in the paragraphs of the allegedly undisputed facts cited above came from defendant's own interested witnesses (senior officers of the State Police), they are incompetent for purposes of a motion for summary judgment, and should be disregarded. Without them, and the evidence in the record asserted to support them, the defendant has failed to show an absence of material facts in dispute, as required for it to prevail. MASS. R. CIV. P. 56(c). Thus, the motion must be denied.

In basing its motion for summary judgment on the credibility of its own witnesses, the defendant has failed to meet the first requirement for such a motion: That the moving party show, through

admissible evidence, that there is no disputed evidence as to any material fact. Mass. R. Civ. P. 56(c); *Premier Capital LLC v. KMZ, Inc.*, 464 Mass. 467, 474 (2013); Fed. R. Civ. P. 56; *Celotex v. Corp. v. Catrett, supra*, 477 U.S. at 323. On this ground alone, the defendant's motion should be denied.

Even if the court were not to dismiss the pending motion because of the defendant's failure to advance sufficient admissible evidence for it to be allowed, however, the plaintiff should still prevail under the familiar formula of *McDonnell Douglas v. Green*, 411 U.S. 792, 802-05 (1973).

B. The Plaintiff Has Made Out A Prima Facie Case.

The plaintiff meets the requirements to set forth a prima facie case, which is not intended to be onerous, but a small showing, easily made; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Che v. Massachusetts Bay Transp. Auth.*, 342 F.3d 31, 38 (1st Cir. 2003), quoting *Kosereis v. Rhode Island*, 331 F.3d 207, 213 (1st Cir. 2003): 1) The plaintiff is a member of a protected class; 2) he was at all relevant times performing at an acceptable level; 3) he suffered an adverse employment action (as outlined above, pp. 12 - 15); and 4) at least one of

the persons transferred to the assignment that the plaintiff sought had similar qualifications to his. *Dragonas v. Sch. Com.* 64 Mass. App. Ct. 429, 442 (2005).

The court below ignored the plaintiff's claim for age discrimination, but he has set out a prima facie case for that as well. He is over 40 and thus a member of the protected class, he was at all times performing his position at an acceptable level, and he sought a position and he was denied it in favor of a substantially younger officer. *Blare v. Husky Injection Molding Sys. Bos.*, 419 Mass. 437, 441 (1995).

C. The Plaintiff Offered Sufficient Evidence of Pretext to Prevail On A Motion For Summary Judgment.

In the context of a case brought under c. 151B, as this one is, pretext means only that a reasonable juror could hold that the employer's asserted reason for an employment decision that harmed the plaintiff was false. *Bulwer, supra*, 473 Mass. at 682, citing *Wheelock College v. Massachusetts Comm'n Against Discrimination*, 371 Mass. 130, 139 (1976). There is abundant evidence to support such a conclusion in this instance.

Maj. Christenson, the commander of Troop F and the person with the primary responsibility to select a lieutenant for the troop in September 2012, admitted that he knew that Lt. Yee had sought a transfer to the troop (R. 203), yet he did not seek to interview the plaintiff, nor did he make any inquiries about his experience, his qualifications or his suitability for the post. (R. 204-205.) In particular, Maj. Christenson did not bother to look at Lt. Yee's performance reviews. (R. 205-06.) A reasonable juror could determine that the reason for the major's indifference was that Lt. Yee would not have received the transfer he sought no matter how sterling his credentials, nor how glowing his references might have been. In short, Lt. Yee was disqualified from selection from the outset, on the basis of one or more immutable characteristics such as race, national origin and/or age. Such attitudes are a hallmark of discrimination. *DeNovellis v. Shalala*, 124 F.3d 298, 314 (1997) ("If America stands for anything in the world, it is fairness to all, without regard to race, sex, ethnicity, age, or other immutable characteristics that a person does not choose and cannot change.")

Maj. Christenson's proffered reason for selecting Lt. Lydon for the transfer in September 2012 was the recommendation of his executive officer, Capt. McGinn. (R. 200.) Yet McGinn admitted that he had no personal knowledge of Lt. Lydon's qualifications, aside from a time years before when the two of them had played hockey together. (R. 238.) Like Maj. Christenson, Capt. McGinn forbore to read either candidate's performance reviews. (R. 241.)

The ostensible deciding factor in the selection of Lt. Lydon was his experience on a Community Action Team, or CAT team. (R. 238.) Based upon Lt. Lydon's description of such a team, however, a reasonable juror might question whether it was good preparation for assignment to Troop F:

> The Community Action Team writes tickets. They go to a specific area within the troop, a problem area where there may be speeders, high crime, and they would saturate that area two or three nights a week with three or four troopers.
>
> You go and you write tickets, sort of a zero tolerance. You also would be available to the duty office, to go to rollovers, any kind of demonstration or emergency situation. Basically it was a proactive team that wrote tickets and made arrests.

(R. 213-14.) During his time at Troop F, Lt. Lydon was not assigned to responsibilities in accord with

his experience on the CAT team. (R. 221, 298.) He spent his entire time at the airport as the supervisor on the midnight shift. (R. 221, 299.) That was experience that Lt. Yee had, but he did not. (R. 162, 164-5, 168, 170.) All of that could lead a reasonable fact-finder to conclude that the reasons put forward for preferring Lt. Lydon to Lt. Yee were untrue.

The choice of Lt. Lydon over Lt. Yee is also questionable in light of the plaintiff's familiarity with Chinese, while Lydon speaks no language other than English. (R. 156, 223.) A reasonable juror could conclude that having police officers who speak languages besides English would be an asset at Logan Airport, the Commonwealth's primary gateway to the rest of the world. (Maj. Christenson admitted that he did not know whether any of his lieutenants spoke Chinese. (R. 300.)) Again, the fact-finder could hold that the reasons said to justify the choice of Lt. Lydon were not merely the result of flawed reasoning, but were not true.

Indeed, the reasonable juror could readily conclude that Lt. Yee was not equal to, but substantially better qualified for the post at Troop F than Lt. Lydon. Most of Lydon's experience (20 years)

prior to being promoted to lieutenant (and being transferred to Troop F on his first day) had been confined to serving as a member of the CAT team for 17 years and, before that, three years on a "55 team," which he described as,

> a unit of five to six guys that would out [sic] on the highways, and their primary responsibility was to write tickets to help reduce fatalities and motor vehicle accidents.

(R. 101-03.) The fact-finder could well conclude that such service, though undeniably worthwhile, had little relationship to the responsibilities at Logan Airport or the Seaport.

In contrast, Lt. Yee had had a broad range of assignments that would have served him well at Troop F. He had been a shift commander for a total of approximately 11 years. (R. 162, 164-5, 168, 170.) He had also been a barracks commander (R. 168-69), a member of the staff inspection unit, (R. 163-64), and a communications officer, in which post he had command over all State Police despatchers. (R. 166.) The breadth of Lt. Yee's experience, and his long time with the command responsibilities of a senior officer, might well convince a fact-finder that he was a superior candidate for assignment to Troop F than Lt.

Lydon. That, coupled with the weak justifications offered for choosing Lydon, would provide ample ground for concluding that the defendant engaged in pretext. *Bulwer, supra*, 473 Mass. at 682.

The defendant asserts that its decisions to select lieutenants for particular assignments were "based upon the Majors and Executive Officers' assessment of: (a) the particular circumstances and needs of Troop F at the time; and (b) the lieutenants' demonstrated skills, experience, and abilities." (R. 282.) The fact-finder might well determine that assertion to be incredible, even if such evidence were admissible at this stage. Given the casual examination that the deciding officers gave to Lt. Lydon's and Lt. Yee's records – notably the failure of either Christenson or McGinn to look at either lieutenant's performance reviews – and the choice not to interview either of them before offering a transfer to Lydon,[6] a reasonable juror might well conclude that that the reason advanced for Lydon's selection was materially false, and that some other factor(s)

---

[6] It is clear from Lydon's account that he was not interviewed, but only asked if he would agree to accept the transfer. (R. 218)

was/were at work. The reasonable likelihood that a juror might reach such a well-reasoned conclusion is sufficient to deny summary judgment; indeed, that result is mandated.

The method of selecting lieutenants for transfer applied at Troop F in September 2008 could also lead jurors to conclude that the defendant engaged in "word of mouth hiring," which has been held to be evidence of discrimination. *Grant v. News Group,* 55 F.3d 1, 8 (1st Cir. 1995); *EEOC v. Steamship Clerks Union, Local 1066,* 48 F.3d 594, 602 (1st Cir. 1995); *Thomas v. Washington County School Bd.,* 915 F.2d 922, 925 (4th Cir. 1990) ("Nepotism and word-of-mouth hiring constitute badges of discrimination in the context of a predominantly white work force"). In assessing the at-best informal manner in which lieutenants were chosen for transfer, the jury could take account of the overwhelmingly white composition of the State Police, and consider whether the pattern that saw only white, and mainly younger lieutenants transferred to Troop F or promoted within the troop and retained there represented the effects of racial or age bias, or at least casts doubt on the defendant's non-discriminatory explanation for its actions. That

would be sufficient to establish pretext and defeat summary judgment. *Blare v. Husky Molding Injection Systems Boston, Inc., supra*, 419 Mass. at443.

Jurors also could conclude that the defendant is liable for discrimination even if the senior officers who denied Lt. Yee his advantageous transfer did so without consciously expressing race or age bias. *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 503, n. 16 (2001), citing *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 55-6 (1999): "The ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias." Given the behavior of Maj. Christenson and Capt. McGinn, just such stereotyping might well have been at work.

CONCLUSION

For the reasons stated above, the Superior Court erred in granting summary judgment to the defendant. Accordingly, the plaintiff requests this court to:

a. Reverse the judgment entered by the Superior Court.

b. Remand this matter for trial.

c. Award the plaintiff his costs and reasonable attorneys' fees for the bringing and arguing of this appeal.

d. Grant such additional relief as the court deems reasonable and proper.

Respectfully submitted,

Warren Yee
By his attorneys,

September 19, 2017

Jonathan J. Margolis
BBO #319980
jmargolis@theemploymentlawyers.com
Powers, Jodoin, Margolis & Mantell LLP
111 Devonshire Street
Boston, MA 02109
(617) 742-7010

Beth R. Myers
BBO #676043
beth@theemploymentlawyers.com
Powers, Jodoin, Margolis & Mantell LLP
111 Devonshire Street
Boston, MA 02109
(617) 742-7010

Gar Chiang
BBO #683460
garchiang@gmail.com
65 Harrison Avenue
Suite 208
Boston, MA 02111
617-901-9595

Certification Under Rule 16(k)

I hereby certify that the foregoing brief complies with all rules pertaining to the filing of briefs in this court.

September 19, 2017

Jonathan J. Margolis

ADDENDUM

NOTICE IN HAND
03.08.17
MASS. A.G.

(WT)

NOTIFY 16

3/8

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2014-1103

Notice sent
3/08/17
J. J. M.
P.,J.,M.& M.
B. R. M.
G. C.
C. LAW F.
J. H. F.J. M.B.

WARREN YEE

vs.

MASSACHUSETTS STATE POLICE

MEMORANDUM OF DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT BY THE MASSACHUSETTS STATE POLICE

(sc)

Plaintiff Warren Yee, a lieutenant in the Massachusetts State Police, sues his employer for discrimination based on race/national origin and based on age, resulting from the failure of the State Police to transfer him from one troop to another. Defendant Massachusetts State Police now moves for summary judgment.

I have reviewed the summary judgment briefs and the supporting record and heard oral argument.[1] I will now allow the motion of the State Police, for the reasons described below.

Background

The following undisputed facts are found in the summary judgment record.

Plaintiff Yee is an American citizen of Chinese descent, born in Hong Kong in 1954. He joined the police force of the Massachusetts District Commission ("MDC") in 1980, and was promoted to sergeant in 1986. He became a sergeant in the Defendant Massachusetts State Police when the MDC police force was merged into the State Police in 1992. The State Police

[1] In reviewing the briefs shortly after oral argument, I discovered that an important page was missing from the brief submitted by the State Police, having been mislaid either before or after the filing of the brief. It took multiple efforts by the clerk to obtain a copy of this page, which counsel for the State Police mailed to the clerk on December 12, 2016. This interregnum accounts for some, but not all, of the delay in the issuance of this decision.

promoted Plaintiff to lieutenant in 1998. Since 2002, Plaintiff has served in State Police Troop H, in South Boston.

In December 2008, when he was 54 years old, Plaintiff requested a transfer to Troop F, which is headquartered at Logan Airport in East Boston. Plaintiff sought this transfer because Troop F, he believes, offers increased opportunities for overtime and paid police detail work.

The State Police declined to transfer Plaintiff to Troop F. Between December 2008 and September 2012, eight white males were either transferred to Troop F as lieutenants, or promoted from sergeant positions at Troop F to serve there as lieutenants. Three of these eight lieutenants were older than 54 when they began serving as lieutenants at Troop F, and five were younger. See Appendix Exhibit I.

In September 2012, Plaintiff sent a memo to the Superintendent of the State Police and other senior officers, in which he stated, "I have waited for four years to be transferred and I am still waiting." He blamed the failure of the State Police to transfer him on discrimination "either because of my ethnic background or my age." He advised the Superintendent that "I may exercise my rights to seek resolution outside the department." Appendix, Exhibit J.

Three days after Plaintiff sent this memo, the State Police filled a lieutenant position at Troop F by promoting Sergeant Shawn Lydon, who was then serving with Plaintiff in Troop H, to lieutenant, and transferring him to Troop F. Lieutenant Lydon then served as a lieutenant in Troop F for two years before being transferred back to Troop H. During those two years, his annual compensation for working overtime and serving on paid details increased by about $30,000. Plaintiff's Statement of Material Facts at 22, ¶¶ 64-66.

State Police lieutenants receive the same base pay and benefits, based on their seniority and skills. Defendant's Statement of Material Facts at 6, ¶ 16. The State Police has imposed "no

reductions in his salary, job duties, or responsibilities" on Plaintiff at any time since he began seeking the transfer. Defendant's Statement of Material Facts at 7, ¶ 17.

Analysis

1. The Requirement of an Adverse Employment Action

It is unlawful for an employer to discriminate against an employee on the basis of age or race or national origin as to compensation or terms, conditions or privileges of employment. M.G.L. c. 150 1B, § 4(1). But every action that causes an employee to suffer "subjective feelings of disappointment and disillusionment" is not necessarily grist for a claim of unlawful discrimination, MacCormack v. Boston Edison Co., 423 Mass. 652, 663 (1996), because a plaintiff bringing such a claim must show an adverse employment action that materially changes objective aspects of the plaintiff's employment, see id., such as a demotion or a firing or a pay cut. As both state and federal appellate courts have noted, "Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." King v. City of Boston, 71 Mass. App. Ct. 460, 469 (2008), quoting Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996).

For example, in Romero v. UHS of Westwood Pembroke, Inc., 72 Mass. App. Ct. 539 (2008), the plaintiff brought a discrimination claim based in part on the fact that, after a corporate reorganization, she no longer reported directly to the company's chief executive officer. The Appeals Court determined that summary judgment for the employer was appropriate because "the restructuring did not change her job duties or her pay," and she presented no other evidence of materially adverse impacts on her work environment. Id. at 544.

Romero relied on MacCormack, id. at 545, where the plaintiff, once the second-ranking person in the employer's security department, argued that he was effectively demoted when "[d]uties were rearranged and new reporting structures devised." MacCormack, 423 Mass. at 661. The MacCormack plaintiff produced evidence that other employees were assigned tasks formerly falling into his bailiwick, while he was assigned tasks that he apparently regarded as demeaning, such as investigating auto accidents and utility pole knockdowns; that employees whom he had formerly outranked were promoted to his job grade, and his request that he therefore be promoted to the next job grade was refused; and that he no longer reported directly to his department head, but rather to another employee who reported to that person. The plaintiff characterized these changes as "a public demotion in front of his peers." Id. The Supreme Judicial Court refused to find any adverse employment action, concluding that the plaintiff had "offered no objective evidence that he had been disadvantaged with respect to salary, grade, or other objective terms and conditions of employment," id. at 663, and that the changes in his work assignment did not constitute a demotion.

Plaintiff does not even argue, as the MacCormack and Romero plaintiffs argued unsuccessfully, that his employer has in any way made his current position *less* desirable, by, for example, altering Plaintiff's current work assignments so as to adversely affect the terms, conditions or privileges of his employment. Rather, his complaint is that the State Police rejected Plaintiff's requests that he be transferred to what he perceives as a *more* desirable assignment at a different barracks and without changing in any way his current job duties or level of responsibility.

The parties correctly recognize that there are no cases under Chapter 151B, and very few federal cases under the analogous provisions of Title VII,[2] discussing whether a failure to transfer an employee to a more desirable position constitutes an adverse employment action. Perhaps for this reason, Plaintiff relies on two legal analogies. He also argues that the refusal to transfer him has caused him to lose potential compensation, thereby adversely affecting the privileges of his employment. I will treat each of these three points in turn.

a. Analogy to a Disadvantageous Transfer

First, the refusal of the State Police to transfer plaintiff laterally to a more desirable lieutenant's position, Plaintiff argues, is analogous to imposing a disadvantageous transfer on him, which has been recognized as an adverse employment action. In support of this proposition, Plaintiff cites only one case, Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121 (1st Cir. 2009). Tobin is not about transfers; the plaintiff there complained that his employer failed to provide him with a reasonable accommodation for his handicap, instead terminating him because of that handicap.

But Plaintiff is correct that an unsought transfer to an objectively inferior position can constitute an adverse employment action. See, e.g., Rivera v. Puerto Rico Aqueduct and Sewers Authority, 331 F.3d 183, 188 (1st Cir. 2003) (applying federal law, including Title VII). However, in such cases the transfer is an "adverse employment action" not just because the new position is less desirable, but because the employer took an *action* to place the employee in that

[2] Where the language of Title VII is similar to language in Chapter 151B, Massachusetts courts look to federal court decisions under Title VII for guidance. King, 71 Mass. App. Ct. at 469.

less desirable position. Here, the employer took no action at all, leaving Plaintiff in precisely the same position that had long occupied, and so his analogy breaks down.

b. Analogy to Failure to Promote

Plaintiff's second analogy is to a "failure to promote" claim. Here Plaintiff does cite relevant authority for the proposition that an employer can commit unlawful discrimination when it fails to promote an employee who applies for an internal promotion. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 766-769 (2001). This analogy, however, founders on the facts.

It is undisputed that the transfer Plaintiff sought have been a lateral move, from being a lieutenant at Troop H to being a lieutenant at Troop F. Plaintiff admits that State Police lieutenants receive the same base pay and benefits, based on their seniority and skills. There is no evidence in summary judgment record that transferring a lieutenant in one barracks to position as a lieutenant in another barracks is a "promotion," as that word commonly used in the employment context. Plaintiff implicitly concedes just the opposite, when he states in his brief that Sergeant Lydon, who had been serving with Plaintiff in Troop H, "was *promoted* to be a Lieutenant [and] on the same date he was transferred from Troop H . . . to Troop F." Plaintiff's Brief at 3-4 (emphasis added).

c. Loss of Potential Compensation

Plaintiff's final argument is that he suffered an adverse employment action because, had he been transferred, he would have made more money. Here Plaintiff relies on one fact and three federal appellate cases, discussed below.

As Judge Ullmann pointed out in denying a motion to dismiss this case, a jury presented with the right facts could reasonably find that an employer's refusal to give a particular

assignment to a police officer violated antidiscrimination laws. Judge Ullman cited, and Plaintiff now relies on, Lewis v. City of Chicago, 496 F.3d 645 (7th Cir. 2007), where an officer argued that the Chicago Police Department discriminated against her on the basis of gender not by refusing to transfer her (so the analogy is imperfect), but rather by refusing to make her part of a contingent of Chicago police officers who traveled to Washington, D.C. to assist local police there during a meeting of the International Monetary Fund. But the adverse employment action in Lewis was not merely the refusal to give the officer the assignment she sought; it was a prerequisite to relief that this refusal cost the officer money. The Lewis plaintiff had no trouble proving this fact, because the Department's memo seeking volunteers for the assignment announced that participating officers "would receive overtime pay for the time they spent traveling and working in Washington." Id. at 648.

Lewis teaches, therefore, that a refusal to transfer a lieutenant from Troop H to Troop F could indeed constitute an adverse employment action if a lieutenant at Troop F automatically earned more money than a lieutenant at Troop H. But, unlike in Lewis, the record contains almost no evidence that this is true here. For example, the record identifies eight lieutenants in addition to Lieutenant Lydon who came to Troop F by way of transfer or promotion between 2009 and 2012 – but, if Plaintiff has explored the effect of their arrival there on their incomes, he did not include that information in the summary judgment record. Alternatively, Plaintiff could have gathered and presented statistical data showing that lieutenants at Troop H routinely earn more money than lieutenants at Troop F – but the record is also silent in this regard.

Instead, Plaintiff bases this argument on one fact: Lieutenant Lydon spent two years as a lieutenant in Troop F, and his annual income from overtime and paid details increased by

$30,000 during those two years. This is the only evidence in the summary judgment record about any potential earnings differential between Troop H and Troop F.

It is undisputed that Lieutenant Lydon was not simply handed an additional $30,000 per year when he stopped being a sergeant in Troop H and became a lieutenant in Troop F. Instead, he earned this additional compensation by working paid details and by working overtime. The summary judgment record contains no evidence from which a jury could conclude that Plaintiff, had he been transferred to Troop F, would have worked the same paid details and just as much overtime as Lieutenant Lydon did. For example, Plaintiff has pointed me to no deposition testimony or affidavit in which he says as much. Furthermore, the record reveals almost nothing about the comparative circumstances of the two lieutenants – except that Lieutenant Lydon is younger than Plaintiff, who turned 60 during the two years that Lieutenant Lydon served in Troop F. In addition, the record reveals nothing about Plaintiff's own history of working overtime or serving on paid details.

In short, the one fact on which Plaintiff focuses – Lieutenant Lydon's increased income at Troop F, resulting from his willingness to work overtime and to work paid details – is entirely anecdotal, concerning the experience of only one of the nine potential comparators who became lieutenants at Troop F in the relevant period (or the even greater number of comparators who might have been covered by a simple statistical analysis). Furthermore, that one fact is completely unconnected to Plaintiff's own circumstances. It is therefore insufficient, by itself, to allow a jury to conclude, reasonably, that Plaintiff lost money when the State Police declined to transfer him to Troop F.

Plaintiff relies on two federal appellate cases in addition to Lewis, but they do not advance his cause. Bonenberger v. St. Louis Metropolitan Police Department, 810 F.3d 1103

(8th Cir. 2016), held, "Denial of a sought-after transfer may constitute an adverse employment action if the transfer would result in a change in pay, rank, or *material working conditions*." Id. at 1107 (emphasis in original). But the Eighth Circuit only found that the transfer at issue there would have resulted in a change in material working conditions because "Sergeant Bonenberger was applying for a different job, not, for example a transfer to the same job in another precinct." Id. at 1107 n.6. For that reason, the court noted, the transfer request in that case "may more closely resemble a hiring action" than a transfer. Id. In today's case, by contrast, Plaintiff is complaining about the refusal of the State Police to give him "a transfer to the same job in another precinct," and the only change in "material working conditions" that he cites anywhere in his brief is his assertion, inadequately supported in the summary judgment record, that in Troop F "there are more opportunities for overtime and police detail work than in other State Police assignments." Plaintiff's Brief at 9.

Plaintiff's reliance on Randlett v.Shalala, 118 F.3d 857 (1st Cir. 1997), is equally unavailing. That case, which involved a federal agency's refusal to transfer its employee from Denver to Boston, does state that "it is hard to see why denial of a *hardship* transfer *in this case* could not be discrimination under Title VII." Id. at 862 (emphasis added). But the First Circuit made this pronouncement reluctantly, noting, "No doubt construing the statute in this manner opens the way to whimsical claims by employees who earlier filed complaints and are now aggrieved by slights." Id. And then the court turned this statement into dicta, by affirming the entry of summary judgment in the employer's favor because there was "virtually no evidence" in the summary judgment record to support the plaintiff's claim. Id. at 863.

The same is true here. This summary record simply would not permit a jury to a reasonably find that Plaintiff was subjected to an adverse employment action when the State

Notice sent
3/08/2017

Police declined to transfer him laterally from one troop to another. Having failed to produce evidence of one of the required elements of a claim of age discrimination or race/national origin discrimination, Plaintiff cannot prevail, and summary judgment must enter in favor of the State Police. (sc)

Conclusion and Order

The Motion for Summary Judgment by the Massachusetts State Police is **ALLOWED.**

Paul D. Wilson
Justice of the Superior Court

March 7, 2017